

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

**Petition Requesting an Investigation )  
Into Retail Access Issues )**

**Case 05-M-0542**

**COMMENTS  
OF  
NATIONAL ENERGY MARKETERS ASSOCIATION**

National Energy Marketers Association (“NEM”)<sup>1</sup> hereby submits its Comments in response to the Commission’s Notice Soliciting Comments dated April 14, 2005, in the above-referenced proceeding. This proceeding was prompted by a Motion filed by NYSEG and RG&E [hereinafter “NYSEG”] requesting the Commission, “to open an investigation to establish market monitoring measures and affiliate rules to prevent potential gaming of the energy markets by companies which both own generation and sell electricity into New York retail markets.” (Motion at 1, Emphasis added.) NYSEG argues that the measures are necessary to fill the regulatory gaps between FERC’s authority, NYISO’s activities and the development of the retail market in the State. (Motion at 5-7.)

In response, NEM asserts that NYSEG’s Motion does not allege facts upon which a nascent Energy Services and Technology Industry can be found to either possess or abuse market power . NYSEG alleges no improper marketer conduct<sup>2</sup> and concurs with both the Commission and

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<sup>1</sup> NEM is a national, non-profit trade association representing wholesale and retail marketers of natural gas, electricity, as well as energy and financial related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, advanced metering, demand and load management firms, billing, back office, customer service and related information technology providers. NEM members are global leaders in the development of enterprise solution software for energy, advanced metering, information services, finance, risk management and the trading of commodities and financial instruments. NEM members also include inventors, patent holders, systems integrators, and developers of advanced power line surveillance and grid reliability technology with advanced uses in Power Line Communications (PLC) technologies as well as new and innovative applications and uses for Smart Electricity.<sup>TM</sup>

<sup>2</sup> NYSEG Motion at n. 7

NEM that the New York wholesale market is effectively competitive.<sup>3</sup> Absent prima facie evidence of both unregulated market power and its abuse, it is imprudent and unwise to impose costly regulatory intrusions onto a price competitive transitional market design. Particularly, since the Commission's Statement of Policy and "Best Practices" is specifically intended to limit market power as well as its abuse by encouraging true price competition while simultaneously encouraging utilities to voluntarily exit competitive functions with fair warning that the state action doctrine has limitations.<sup>4</sup> NEM submits that NYPSC's reliance on and encouragement of market-based price and technology competition to achieve just and reasonable rates is a key public policy decision that has served and will continue to serve the public interest of the citizens of New York very well in many respects.

It also appears that NYSEG's Motion, if granted, could disadvantage its competitors with a significant increase in regulatory costs. Yet, omitted from NYSEG's list of interesting but

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<sup>3</sup> NYSEG Motion at n.10

<sup>4</sup> The Supreme Court has consistently held that a private party's anticompetitive conduct is not protected by State immunity unless "**first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct and second, the State provides active supervision of the anticompetitive conduct.**" *FTC v. Ticor Title Ins. Co.*, 540 U.S. 621, 631 (1992).

It is important to document NYSEG's admission that it is not and should not be the policy of the State of New York to allow anticompetitive conduct. It is equally important for this Commission to note that as state protected, rate-based monopolies, utilities seem to be technically permitted to compete against unregulated entities in a competitive market, and apparently, some still do.

As a regulated utility, it appears that NYSEG was granted regulatory authority to charge a 35 percent premium under its "price protection plan" and consumers were not given an election to "opt into" the program. Instead, it appears as though they were treated more like captive customers and defaulted into it. Consequently, NYSEG was technically permitted to charge prices that were "legal" because they did not use a separate corporate entity and the Commission arguably approved the prices. Yet, the record reflects that these prices could potentially reap NYSEG tens of millions of dollars per year in commodity related profits, without the necessity to price compete. Additionally, consumers were not required to make an affirmative election to "opt-in" to such a program.

NEM requests the Commission to consider that if utilities are permitted by state law to compete as utilities (rather than separate entities with firewalls and codes of conduct) then if the Commission accedes to NYSEG's request for more "monitoring", it is possible even realistic to foresee that a utility charged with an anti-trust violation would argue that this "monitoring" should be construed as "active supervision" of otherwise anticompetitive conduct, namely the use of a utility to compete in an otherwise competitive marketplace. NEM submits that the public interest requires more formal rules governing "monopoly competition." NEM would urge the Commission to seriously consider this matter.

inapposite innuendos is the overwhelmingly anti-competitive impact of a utility competing as a state protected, rate-based monopoly without a separate corporate entity, corporate firewalls and affiliated codes of conduct. As a matter of law, economics and public policy it is difficult to see a public interest efficiently served by such “monopoly competition.” Regardless, if they are the “smartest ones in the room.”

NEM agrees with NYSEG that predatory pricing is an extremely serious issue of law and public policy. However, NEM has yet to see a new market develop in which politicians, consumers, utilities and/or competitors are so asleep as to allow unregulated monopolies to replace regulated monopolies.<sup>5</sup> NEM members have, however, experienced what might be considered “predatory pricing” when POLR services are offered at less than the fully allocated embedded cost of serving retail load. Equally anti-competitive is the use of captive ratepayer funds to hedge volatile commodity risks and offer fixed price products that could and should be offered by competitive suppliers with fully-at risk capital.

To be clear, NEM steadfastly opposes predatory pricing and the abuse of market power, regardless if it is regulated, and especially if it is improperly protected by the state action doctrine. However, to establish, maintain and promote competitive neutrality as requested in NYSEG’s Motion, NEM would suggest that the Commission should first prohibit “monopoly

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<sup>5</sup> Twenty years ago, who would have imagined that long distance rates might one day be free? Yet today, Yahoo Messenger allows free PC to PC long distance calls. Therefore, it might be theoretically possible that the rebundling of energy and advanced technology may eventually cross subsidize the sale of energy to the point that it might appear to be selling below cost.

It is also possible that absent realistic credit regulations, firms with stronger balance sheets or lower cost access to capital may have a decisive competitive advantage. However, a lower cost of capital working its way down the value chain is not necessarily bad or anticompetitive. NEM has long anticipated that absent more realistic credit requirements, competitors with stronger balance sheets would better capitalize on this advantage by creating new and innovative “commodity, risk, financial, load-shaped, and possibly fixed-price” products to capture more of the “retail premium” (demand aggregation premium) that restructuring creates. In so doing, larger entities that normally perform a wholesale function could empower other marketers (with smaller organizations and overhead) to better price compete at the retail level.

competition,” in any New York service territory. Then, once the playing field is relatively level any competitive anomalies might be more obvious and both easier and less costly to detect.

Separate, affiliated entities, firewalls and affiliated codes of conduct are well settled law and a far “better practice” than permitting regulated utilities to compete as regulated monopolies. However, NEM agrees with this Commission; that the “Best Practice” would be to encourage utilities to reallocate “state-protected capital and resources” out of competitive functions and into public interest reliability investments and infrastructure upgrades. NEM submits that this is a higher public service and better use of “state revenue protection” for a franchise monopoly.

NEM submits that a reasonable conclusion can be reached that NYSEG’s Motion to investigate monitor and impose significant regulatory burdens<sup>6</sup> on potential competitors lacks sufficient evidence to support such a result. Equally lacking in merit and evidence is the notion that a utility has less market power even if it totally exits all competitive functions. Natural gas and electricity still have no value unless they are delivered to the right consumer, at the right time in the correct amounts. Given the ability of utilities to compete as monopolies, it is difficult perhaps impossible for the nascent Energy Services and Technology Industry to acquire and abuse market power as a result of the NYPSC’s policies that implement price competition and migration-based reliability incentives for utilities.

NEM urges the Commission to reject NYSEG’s call for an investigation, which by NYSEG’s own admission is unsubstantiated, unsupported and premature inasmuch as NYSEG is, “not

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<sup>6</sup> NEM submits that “(1) NYSEG’s proposed code of conduct for non-utility affiliates, (2) Coordination with the NYISO to identify market behaviors in the wholesale market that may adversely impact the retail market, (3) Establishment of market screens to detect affiliate transactions that create the potential for market manipulation or predatory pricing, (4) Collection of pricing information over time to assess trends in pricing and potential market manipulation, and a report of findings, and, (5) Establishment of a hotline for ESCO’s [sic], ESCO employees, customers and other parties to report potential market abuses on a timely basis. (Motion at 8.)” are suggestions that may one day be helpful, but currently have no factual support. Until there is either true competitive neutrality or a full utility exit from competitive functions (hopefully by a date certain), it may be premature as a matter of both law

asserting that any ESCOs in New York have engaged in improper conduct.”<sup>7</sup> This Commission has undertaken tremendous efforts to lay the foundation for a successful retail energy market in New York. The measures that NYSEG request could unnecessarily jeopardize this progress without factual support at a pivotal time in the market’s development. NEM is not suggesting that this Commission turn a blind eye to the conduct of market participants, but rather that it not adopt drastic measures to combat issues which NYSEG merely speculates may potentially occur, if ever, at some undefined time in the future. A far more appropriate measure for Commission consideration at this stage of market development would be to ensure competitive neutrality among all commodity suppliers in both form and substance. Prohibiting utilities with “revenue protection and state franchise monopoly status” from competing, using captive ratepayer funds, against competitive suppliers with fully at risk capital, is an important and competitively neutral way to improve an emerging competitive retail energy market.

However, NEM submits that it is of maximum import that this Commission continue to demonstrate its firm resolve to require utilities to exit competitive functions by a date certain. The Commission’s reliance on market-based rates, price competition and migration-based reliability incentives can and should create substantial value for the entire state of New York. Increasing regulatory certainty alone reduces both the costs and risks associated with unregulated investments to serve NY consumers. It is vital that each stakeholder be able to rely on Commission policies and pronouncements when developing business plans and investment decisions.

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and public policy to consider imposing such costly and heavy-handed regulatory burdens on one segment of the competitive marketplace.

<sup>7</sup> NYSEG Motion at n.7.

## CONCLUSION

The Commission has wisely and correctly decided not to second guess the market-based pricing resulting from the emergence of a competitive, Energy Services and Technology Industry. This Commission should affirm its prior decisions and consider establishing a rebuttable presumption that market-based rates are just and reasonable unless a prima facie factual showing can be made to the contrary. This Commission's substantial authority to ensure just and reasonable rates in the State of New York coupled with FERC's just and reasonable rate authority at the wholesale level is more than adequate to combat market manipulation when necessary. NEM would urge that costly, heavy-handed regulatory burdens not be placed on this nascent industry (both prematurely and unwarrantedly) in a manner likely to stifle market participation and innovation. If substantiated allegations of market power abuse or illegal gaming are ever brought to the Commission, the public interest would require it to protect and ensure the integrity of the New York energy markets and move swiftly to coordinate its efforts with those of FERC, if necessary, to correct any improprieties. However, in this case the requested actions may have far more damaging impact than any problem that has been substantiated to exist.

Respectfully submitted,

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cc: Service List